NO. 20214

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONA LEGG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S ANSWERING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
FREDERICK M. BROSIO, JR.,
Asst. U. S. Attorney,
Chief, Civil Division,
LARRY L. DIER,
Asst. U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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JURISDICTION

Jurisdiction in the District Court was alleged to be based on the Federal Old Age Benefits Insurance, the Federal Tort Claims Act, 28 U.S.C. § 1257, and 28 U.S.C. § 2303. (T.R. pp. 2 and 77). Title 28, U.S.C. § 1257 relates to appeals from the highest state court to the Supreme Court of the United States and has absolutely no bearing on the case at hand. Title 28 U.S.C. § 2303 is nonexistent and, therefore, cannot confer any jurisdiction.

The Federal Old Age Benefits Insurance allegation of jurisdiction is apparently an allegation of jurisdiction under the Social Security Act, Title 42, U.S.C. The jurisdictional provisions

of the Federal Tort Claims Act are in 28 U.S.C. § 1346. With these allegations, the District Court had jurisdiction to consider the appellant's claims.

The orders dismissing the appellant's Complaints being final orders (T.R. pp. 51 and 83), this Court has jurisdiction of the present appeal from them under the provisions of 28 U.S.C. § 1291. The problems arising from the failure of the appellant to file a Notice of Appeal in case number 64-732 CC will be considered separately in our argument.

STATEMENT OF THE CASE

This is an appeal from two related actions originating in the Southern District of California, Central Division. The plaintiff in each case was Leona Legg, and the defendant in both of them was the United States of America. Case number 64-591 CC was filed on May 4, 1964, and case number 64-732 CC was filed on June 1, 1964. Both cases were dismissed by Order of the Honorable Charles H. Carr dated July 28, 1964. Case number 64-591 CC was dismissed on the motion of the United States of America. That motion was made on the grounds that the Court lacked jurisdiction of the subject matter and that the Complaint failed to state a claim upon which relief could be granted. Case number 64-732 CC was dismissed on the Court's own motion on the ground that the Court lacked jurisdiction of the subject matter. After a denial of her Motion for Reinstatement on September 11,

1964, the appellant filed her Notice of Appeal in case number 64-591 CC.

ISSUES PRESENTED

1. Is there jurisdiction of the appeal in case number 64-732 CC?

2. Does res judicata operate as a bar to the appellant's claims?

   (a) General application of the rules.

   (b) The fraud, inadvertence or mistake claimed by the appellant.

3. Did the District Court err in failing to allow appellant to amend her complaint?

ARGUMENT

1. This Court Has No Jurisdiction To Hear An Appeal From Case Number 64-732 CC.

Orders dismissing cases number 64-591 CC and 64-732 CC were signed and entered on the same days (T. R. pp. 50, 51, 53, 83 and 85). Thereafter, the appellant filed a Motion for Reinstatement of the Action in case number 64-591 CC (T. R. p. 54). Upon the denial of this motion (T. R. p. 68), the appellant filed her Notice of Appeal in case number 64-591 CC, only (T. R. p. 71).

In her Designation of Record on Appeal (T. R. pp. 73-76), the appellant indicates an attempt to appeal from the dismissal orders in both cases. Without having filed a Notice of Appeal in case number 64-732 CC, the appellant has attempted to have the dismissal order reviewed by this Court.

> Filing of notice of appeal within the required time is jurisdictional.
>
> Mondakota v. Montana-Dakota Utility Co., 194 F. 2d 705 (9th Cir. 1952);
>
> Stone v. Wyoming Supreme Court, 236 F. 2d 275 (10th Cir. 1956).

> "Since notice of appeal was not filed until after the expiration of thirty days from the entry of judgment appealed from, and no effective action was taken in the court below to extend the appeal period, we do not possess the power to entertain the appeal. Consequently, it will be dismissed for lack of jurisdiction."
>
> Plant Economy, Inc. v. Mirror Insulation Co., 308 F. 2d 275 (3rd Cir. 1962).

The filing of a notice of appeal is jurisdictional. In this case, the order dismissing the Complaint in case number 64-732 CC was entered on July 29, 1964 (T. R. p. 83). Thereafter, the appellant did nothing to keep her appeal time alive. Indeed, there was no indication that she even considered an appeal from 64-732

CC until her Designation of Record filed on October 7, 1964, referred to a notice of appeal in it. These facts are not such as would justify the Court in considering an appeal in 64-732 CC.

The appellee is aware of cases like Parks v. B. F. Leaman and Sons, Inc., 279 F.2d 529 (5th Cir. 1960), and Passi v. Telechron, Inc., 349 U.S. 46, 75 Sup. Ct. 577, 99 L.Ed. 867 (1955). The Parks case held that where one notice of appeal and one filing fee were paid in the appeal from nine separate, but related, admiralty cases, the Court of Appeals had jurisdiction to hear all of them. It is plainly distinguishable from the case at bar in that here no notice of appeal was ever filed in case number 64-732 CC. An examination of the language of the Parks decision shows that it is in accord with the rule above announced.

> "While we, of course, agree with appellee's proposition that substantial compliance with the requirements for appeal is jurisdictional, and therefore mandatory, we cannot agree with their view that the filing of a single notice and the payment of a single fee was not substantial compliance."
>
> Parks v. B. F. Leaman and Sons, Inc., supra, p. 532.

In the Mondakota case, supra, the Court of Appeals was faced with a situation where the appellant had tendered his notice of appeal to the clerk within the appeal time, but he had failed to tender the filing fee within that time. Although the filing fee was

later tendered, it was after the time for appeal had passed. The clerk refused to accept the notice without the filing fee. The Court of Appeals said that under these circumstances it was without jurisdiction to hear the appeal. Mondakota Gas Co. v. Montana-Dakota Utility Co., supra.

A factually similar situation was presented to the Supreme Court in the Passi v. Telechron case, supra. There the court held that tender of the notice of appeal without the filing fee was enough to give the court jurisdiction to entertain the appeal. Even with this modification of the Mondakota rule, it is clear that failure to file a notice of appeal within the time allowed creates a fatal defect in the appellate court's jurisdiction. The appeal in case number 64-732 CC must, therefore, be dismissed. This Court is without jurisdiction to consider that appeal because a Notice of Appeal was never filed.

2. Res Judicata Operates As a Bar to the Appellant's Claims.

(a) Res Judicata Generally.

It is apparent from the record that the basis of the dismissal of the appellant's Complaints in the lower court was based on the doctrine of res judicata. The appellee's Motion to Dismiss (T. R. pp. 11-37) particularly incorporated the pertinent portions of the record of case number 62-1624 HW. As a ground for the

Motion to Dismiss, res judicata was specifically mentioned (T. R. p. 15). Rule 43(e), Federal Rules of Civil Procedure, allows for the consideration of matters outside the pleadings in the consideration of a Rule 12 motion. Therefore, the lower court's consideration of the issue of res judicata on a motion to dismiss was proper.

The arguments in support of the dismissal of case number 64-591 CC on the basis of res judicata would apply equally well in support of the dismissal of case number 64-732 CC, were an appeal in that case before the court. The dismissal there was on the court's own motion (T. R. p. 83). The dismissal was signed on the same day as that in the case numbered 64-591 CC. Had the appellant appealed from the dismissal of 64-732 CC, we would apply the following authorities to argue the dismissal was also correct.

The necessary elements for res judicata are correctly set out in the case of Bernard v. Bank of America National Trust and Savings Association, 19 Cal. 2d 807, 122 P. 2d 892 (1942), which the appellant cited. It is well settled that a judgment entered in an action conclusively settles that action as to matters that were or might have been litigated or adjudged.

Partmar Corp. v. Paramount Corp.,
347 U. S. 89, 74 Sup. Ct. 414,
98 L. Ed. 532;

Cromwell v. County of Sac,
94 U. S. 351, 352, 24 L. Ed. 195;

Fayerweather v. Ritch,

195 U.S. 276, 300, 308, 25 Sup. Ct. 58,

49 L. Ed. 193;

Gunter v. Atlantic Coast Line R. Co.,

200 U.S. 273, 290, 26 Sup. Ct. 252,

50 L. Ed. 477;

Stoll v. Gottlieb,

305 U.S. 165, 59 Sup. Ct. 134,

83 L. Ed. 104.

"We think it sufficient to quote briefly from the Supreme Court Opinion in Southern Pacific R. Co. v. United States, 1897, 168 U.S. 1, at page 48, 18 S. Ct. 18, 42 L.Ed. 355:

> ' * * * a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. ' "

Bridges v. United States,

199 F.2d 811, 826 (9th Cir. 1952).

The rule is too well settled to admit to argument. However the appellant seeks to avoid the application of the rule. At page 11 of her Opening Brief, the appellant cited the Bernard case, supra, and lists the three elements of the test of applicability of the doctrine of res judicata. We are told by the appellant that the issues of the two cases, numbers 62-1624 HW and 64-591 CC, were not the same. We are told that there was no final judgment in 62-1624 HW. We are also told that the parties defendant were not the same.

As to the question of the issues being the same, the appellant's arguments have no merit. In both cases, and in 64-732 CC as well, the only basis of the appellant's claims is in connection with Title 42, U.S.C., the Social Security Act. The quotation from the Southern Pacific R. Co. v. United States cited in Bridges v. United States, supra, is directly in point. Even though the Complaints in 62-1624 HW and 64-591 CC (or 64-732 CC) may sound differently, the "right, question, or fact" of the appellant's eligibility for benefits under Title 42, U.S.C. cannot be relitigated here. These rights, questions and facts have been conclusively determined under the Findings of Fact, Conclusions of Law and Judgment entered in case number 62-1624 HW. The appellant is bound by that decision since she did not appeal it.

Next the appellant argues at page 11 of her Opening Brief that there was no final decision in the case numbered 62-1624 HW, only a "judgment of dismissal without a trial". This is an obviously incorrect statement. The judgment in case numbered

62-1624 HW was entered after a hearing of the motion of the defendants for summary judgment. Findings of fact were made and conclusions of law adopted. The decision of the defendant Anthony Celebrezze, was found conclusive and was affirmed (T. R. pp. 34-36). Clearly, this was a decision on the merits by which the appellant here is bound since she did not appeal it.

Lastly, the appellant claims that the doctrine of res judicata is not applicable because the parties in the two cases, 62-1624 HW and 64-591 CC, were not same. There is no merit in this argument either.

> "The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in Chicago, R.I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 620, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same.' A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. Cromwell v. County of Sac, 94 U.S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue

between that party and another officer of the government." [Emphasis added].

Sunshine Coal Co. v. Adkins,
310 U.S. 381, 402-403, 60 Sup. Ct. 907,
84 L. Ed. 263.

Also directly in point here is the case of Edgar v. United States, 171 F. Supp. 243 (Ct. Cl. 1959). There the appellant had sued for money damages for a wrongful discharge as a federal employee. The appellant had previously lost a suit in the district court for reinstatement on the grounds that he had not exhausted his administrative remedies. The Court of Claims held that appellant was estopped by res judicata in his claim for money damages by the unappealed district court decision.

Appellant's position here is exactly analogous. She is bound by a valid judgment that the administrative handling of her claims is conclusive. It is axiomatic that if the appellant in this case does not have a valid claim for benefits under the Social Security Act, a denial by the officers of the Department of Health, Education, and Welfare, of any benefits could not be wrongful. The issues being the same in the case numbered 62-1624 HW as they are in the one now on appeal, the appellant is barred from relitigation of them. The decision of the district court dismissing the Complaint was correct and must be affirmed.

(b) Fraud, Inadvertence Or Mistake Claimed in Case Number 62-1624 HW.

To avoid the application of the rule of res judicata, the appellant seeks to have the judgment in case number 62-1624 HW held void due to intrinsic or extrinsic fraud, inadvertence or mistake.

The appellant's position with regard to this action, number 62-1624 HW, is set forth in her Statements of Points, number VI at page 99, of the Transcript of Record, and in her Opening Brief at page 12. Although the two statements are not entirely consistent, it seems that the appellant claims that the final judgment which was entered in case number 62-1624 HW is void because the Notice of Motion which she filed on September 12, 1963, which appears at page 94 of the Transcript of Record, was somehow put in the wrong file. The appellant goes on to claim, in her Statement of Points, that she was unaware of the misfiling of this Notice of Motion until the time to appeal had expired. Apparently this is an argument saying that the lower court in case number 62-1624 HW did not have a chance to consider her Motion for Default Judgment against the defendant.

The Transcript of Record at pages 86 through 93, conclusively answers this argument. From these papers it appears that the appellant did know of the entry of judgment against her and that she brought to the court's attention her claimed default and a request to have judgment entered on it. The motions and

notices contained in pages 86 through 93 in the Transcript of Record are all filed with the court within the sixty day appeal period. Therefore, there is no substance to the claim that the court in 62-1624 HW was unaware of her claimed default and request for judgment. The court considered these matters and decided against the appellant. By her failure to appeal, she is bound by that judgment.

3. The District Court Did Not Err In Failing To Allow Appellant To Amend Her Complaint.

The appellant urges as error the failure of the district court to grant her leave to amend her Complaint prior to dismissal (Opening Brief, p. 3). The appellee is aware of the liberal construction usually allowed persons unfamiliar with the procedural aspects of presenting a claim. While appellee agrees that the kind of decision announced in the case of Dioguardi v. Durning, 139 F. 2d 774 (2nd Cir. 1944) is correct, the rule is not applicable here. We have seen that the fatal defect of the appellant's Complaint is that the issues raised have already been adjudicated adversely to the appellant. Since the prior adjudication was not appealed, it is binding on the appellant here.

No amount of amendment could cure the defect found in the Complaint. The appellant cannot continue to harass the courts with a multitude of suits such as those three involved in this case. For reasons of sound public policy the doctrine of res judicata

must be applied to silence the all-inclusive and often repeated Complaints of the appellant. The district court did not abuse its discretion in not allowing appellant leave to amend.

SUMMARY

The appeal in case number 64-732 CC must be dismissed because the appellant did not file a Notice of Appeal. Therefore, this Court has no jurisdiction to modify or alter the judgment in that case. We have also noticed that the arguments of res judicata apply to the district court's original dismissal, and we are satisfied that substantial justice was done then.

All of the requirements of res judicata are present in the dismissal of case number 64-591 CC. The parties are the same or in privity to the parties in the earlier case. The issue in both cases was the right of the appellant to benefits under 42 U.S.C. § 405(g), the Social Security Act. There was a final adjudication in the former case which decided against the appellant here. That adjudication is now binding on this court. For these reasons, the judgment appealed from must be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
FREDERICK M. BROSIO, JR.,
Asst. U. S. Attorney,
Chief, Civil Division,
LARRY L. DIER,
Asst. U. S. Attorney.

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Larry L. Dier
LARRY L. DIER